



29. June 2020

### **Inception Impact Assessment for a New Competition Tool ('NCT'). Danish Comments.**

The Danish Government appreciates the opportunity to comment on the EU Commission's Inception Impact Assessment for a New Competition Tool ('NCT').

The Danish Government supports the general objective of the proposed legislative initiative, which consists in ensuring fair and undistorted competition in the single market. We believe that a fair and effective competition policy is a cornerstone of the single market and a pre-requisite to bolster EU global competitiveness in the future.

Furthermore, the Danish Government considers the current competition framework effective in terms of handling anti-competitive behaviors in the platform economy, but recognizes that there is a need to update elements of the competition framework in order to ensure even stronger enforcement in the digital age. In this sense, it is important to evaluate the opportunity to introduce policy options beyond traditional competition rules, especially when the existing legal framework is considered insufficient in term of handling the emergence of new structural competition problems, or at least to address them in an effective manner.

However, the Danish Government highlights the need to prevent overlaps between traditional competition enforcement, *ex ante* regulatory framework and the New Competition Tool. Therefore, the Commission should make clear in the impact assessment *if* there are overlaps and *where* these exist. The Commission should also put forward suggestions on how to solve those overlaps and be willing to abandon one or more of the initiatives. In this regard, the Danish Government highlights the need for careful coordination between the impact assessments led by DG GROW, DG CNECT and DG COMP.

The Danish Government perceives the proposed New Competition Tool as a substantial innovation in the enforcement of EU competition law, as the Commission would be able to intervene *ex ante* against certain market

structures or perceived market failures and to impose remedies without the need to prove any infringement of competition rules.

NCT would thus alter the traditional *ex post* paradigm that has characterized EU competition law enforcement over the past 60 years. Therefore, the Danish Government believes that such significant enlargement of the Commission's power of intervention has to come with adequate procedural safeguards and proportionality checks. Furthermore, we invite the Commission to evaluate the likely impact of the proposed New Competition Tool on fundamental rights and due process, and to clarify the level of engagement of the involved undertakings and National Competition Authorities (NCAs).

Danish Government encourages an attentive consideration and further clarification of five main aspects relating to the New Competition Tool, namely: i) the scope of application; ii) the threshold test for initiating an investigation; iii) procedural safeguards and fundamental rights; iv) the imposition of remedies; v) the interaction with other policy instruments and NCAs.

### **1. The scope of application**

The Danish Government invites the Commission to clarify the possible scope of application of the New Competition Tool and the four policy options envisaged by the Commission to adopt either a *horizontal* (Options 1 and 3) or a *limited* (Options 2 and 4) *scope of application*. In option 1 and 3, the New Competition Tool would be applicable across all sectors, while options 2 and 4 would be triggered only in presence of characteristics like extreme economies of scale and scope, strong network effects, zero pricing and data. While these characteristics can produce very efficient companies, they also may favor a decrease in competition and "winner-takes-most" scenarios, and are typical of digital and digitally-enabled markets.

In our view, the Commission should provide a sound justification for expanding the use of the New Competition Tool across the entire economy. In fact, albeit extreme economies of scale, data dependency and strong network effects could also emerge in traditional markets, the presence of such features appears to be less pervasive than in digital industries.

### **2. The applicable test for initiating an investigation**

The Danish Government urges the Commission to clarify the threshold test for triggering a market investigation. Particularly, in case of a market structure-based competition tool (Options 3 and 4), the Commission should delineate the *type of structural problems* that the New Competition Tool could tackle. The Commission should also explain its use in case of tacit collusion - a situation that does not need to involve any collusion in the

legal sense or communication between the parties - which usually falls outside the reach of EU competition law.

Further, it should be noticed that the concept of dominance, often identified through market shares, comes with the benefit of increasing legal certainty and predictability, since it is easier for companies to assess whether they are dominant and thus potentially the target of an investigation. This increases business trust and, arguably, the willingness to invest. The Danish Government encourages the Commission to evaluate the effect that a market structure-based competition tool (Option 3 and 4) could have on investment and innovation incentives, especially where an undertaking, notwithstanding the absence of any infringement, could be imposed significant remedies such as divestiture of assets or structural separation.

### **3. Procedural safeguards and fundamental rights**

The Danish Government invites the Commission to clarify the level of engagement accorded to the undertakings active on the market concerned, especially with regard to their rights of defense and the right to judicial review. In this sense, the Commission should clarify whether the New Competition Tool will allow e.g. to conduct oral hearings, thus giving the possibility to an undertaking to respond to the Commission's findings. Furthermore, the Commission ought to explain several aspects relating to the proposed new legislative initiative, including whether the Commission will launch this instrument *ex officio* or also in response of complaints, or which traditional investigative and enforcement tools can be used (e.g. unannounced inspections or interim measures).

### **4. The imposition of remedies**

The Danish Government urges the Commission to cast light on the legal standard adopted for the imposition of remedies. Particularly, the Commission should clarify what will trigger such intervention (e.g. *actual* or *potential* anti-competitive effects, or rather an "*adverse effect on competition*" such as in the UK).

Furthermore, the Commission needs to identify the range of available remedies that it is willing to adopt, and the circumstances which make it possible to apply a structural (e.g. forced divestitures) rather than a behavioral remedy (e.g. transparency obligations or codes of conduct). Further questions revolve around the role of the Commission in overseeing the implementation of the remedies adopted; the possibility to impose fines in case of an undertaking not compliance with the remedy imposed; and the possibility to review a remedy in case of new market circumstances.

### **5. The interaction with other policy instruments and NCAs**

The Danish Government encourages the Commission to provide clear indications with regard to the interaction of the New Competition Tool with existing competition policy tools. In fact, besides situations of potential enforcement gaps, there are circumstances where the New Competition Tool could overlap with other existing tools. This includes the presence of a highly concentrated market, which could be investigated through a traditional sector inquiry. Furthermore, in case of a dominance-based competition tool (Options 1 and 2), a unilateral behavior by a dominant undertaking could be addressed under Art.102 TFEU. The Commission should thus further clarify the kind of problems for which the New Competition Tool has been designed, and how it intends to prioritize its use over other possible enforcement tools.

Finally, the Danish Government invites the Commission to consider carefully firstly, whether the exercise of the New Investigative Tool will overrule NCAs' power to act, and secondly, whether in case of effects on trade between member states, NCAs could apply this same tool at national level, also taking into consideration its possible impact in terms of fragmentation.

We hope these comments will be useful for your further work. The Danish Ministry of Industry, Business and Financial Affairs would be at your disposal to further elaboration or any follow-up questions you may have.